

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KELLI Y. CLINGMAN,

Plaintiff,

v.

SARIANG SOMY et al.,,

Defendants.

2:10-CV-1834 JCM (LRL)

ORDER

Presently before the court are defendants Bank of America's, BAC Home Loans Servicing, LP's and ReconTrust's (hereinafter "BAC defendants") motion to dismiss complaint pursuant to Federal Rules of Civil Procedure 12(b)(6), 9(b), and 8(a). (Doc. #9). Plaintiff responded (doc. #26), and defendants replied (doc. #30).

I. RELEVANT FACTS

Two of the defendants that are not part of this motion to dismiss, Sariang Somy ("Somy") and Saisuda Saedan ("Saisuda"), leased a property at 8339 Freshwater Pearl Street, Las Vegas, Nevada 89139 to the plaintiff. Somy failed to pay the mortgage on the property and on November 5, 2010, Mortgage Electronic Registration Systems ("MERS") recorded a notice of default on the property. After MERS recorded a substitution of trustee to appoint ReconTrust as the new trustee on November 15, 2007, ReconTrust subsequently recorded a notice of default on June 1, 2010.

On December 7, 2007, the plaintiff was given a joint tenancy interest in the property after threatening to sue Somy and Saisuda for fraud. Currently, Somy and the plaintiff are the recorded owners of the property. Plaintiff claims that she has been "diligent in her efforts to assume the loan"

1 for the property, but to no avail. (Doc. #1 - compl. ¶97). Specifically, plaintiff attempted to get a
 2 modification on the loan herself, but was denied because she failed to obtain consent from the other
 3 joint tenants. (*Id.* at ¶98).

4 **II. MOTION TO DISMISS**

5 Pro se litigants are held to a less stringent pleading standard than attorneys. *Haines v. Kerner*,
 6 404 U.S. 519, 520 (1972). However, all complaints must set forth enough facts to state a claim that
 7 is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The court evaluates
 8 the pleading according to Federal Rule of Civil Procedure 8, which requires a short and plain
 9 statement showing that the pleader is entitled to the relief sought.

10 To comply with Rule 8, a complaint must clearly and concisely state which defendants are
 11 liable for which wrongs based on which facts. *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir.
 12 1996). Moreover, the complaint should not contain irrelevant or only slightly relevant material. *Id.*
 13 It is the plaintiff's duty to ensure the complaint is coherent, logical, and well-organized. *Hearns*, 537
 14 F.3d at 1127.

15 A. Claim 1 - Preliminary Allegations

16 Plaintiff's first claim for relief does not state a cognizable claim, but merely recites factual
 17 allegations.

18 B. Claim 2 - Violation of the Truth In Lending Action ("TILA")

19 "The purpose of the Truth In Lending Act is to ensure that users of consumer credit are
 20 informed as to the terms on which credit is offered them." *Jones v. E*trade Mortg. Corp.*, 391 F.3d
 21 810, 812 (9th Cir. 2005). In *White v. Deutsche Bank National Trust Co.*, the court found "no
 22 authority for the proposition that Plaintiffs who are not a party to the loan may sue Defendants for
 23 a violation of TILA." 2010 WL 3420766, at *3 (S.D. Cal. Aug. 30, 2010); *See also Green v. Alliance*
 24 *Title*, 2010 WL 3505072, *7 (E.D. Cal. Sept. 2, 2010) (dismissing plaintiff's TILA claim for lack
 25 of standing as her name was not on the loan).

26 Here, like the plaintiff in *Green*, plaintiff has no standing to make a TILA claim because she
 27 was not the person who obtained the loan (compl. ¶10), and her name is not on the promissory note
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1 (doc. # 10, exhibit A).

2 C. Claim 3 - Violation of the Real Estate Settlement Procedures Act ("RESPA")

3 "Congress enacted RESPA in 1974 to protect home buyers from inflated prices in the home
4 purchasing process." *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1008 (9th Cir. 2002).
5 Additionally, "no person shall give and no person shall accept any fee, kickback, or thing of value
6 pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of
7 a real estate settlement service involving a federally related mortgage loan shall be referred to any
8 person." *Id.* at 1009 (citing 12 U.S.C. § 2607(a)).

9 Plaintiff lacks standing to make a RESPA claim because she was not the person charged with
10 the settlement service and because she was not the original borrower of the home loan. Specifically,
11 plaintiff claims defendants violated 12 U.S.C. § 2607. The defendants, if found to have violated this
12 section, would only be held liable to "the person or persons charged for the settlement service." 27
13 U.S.C. § 2607(d)(2). Somy, the original borrower, was charged for the services when he purchased
14 the property. (Compl. ¶140). Thus, the plaintiff again lacks standing because she was not the person
15 who obtained the loan (compl. ¶10), and her name is not on the promissory note (doc. # 10, exhibit
16 A).

17 D. Claim 4 - Breach of Contract

18 Plaintiff's fourth claim fails against the BAC defendants because her breach of contract claim
19 regarding her "Lease Purchase Option" (compl. ¶152) implicates defendants Saisuda and Somy, not
20 the BAC defendants.

21 Plaintiff does not have a loan with the BAC defendants to modify.

22 E. Claim 5 - Bad Faith Denial of Existence of Contract

23 The plaintiff alleges in the fifth claim for relief that the notice of default was not valid
24 (compl. ¶164), that the substitution of trustee was not valid (compl. ¶166), that the BAC defendants'
25 failed to settle claims outside of the court (compl. ¶169), and that the plaintiff was never shown the
26 note to foreclose (compl. ¶177).

27 ReconTrust recorded a valid note of default against the property on June 1, 2010. (Doc. # 10 -
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Exhibit K). Additionally, there is no legal requirement that the BAC defendants settle. *McCurdy v. Wells Fargo, N.A.*, 2010 WL 4102943, *3 (D. Nev. October 18, 2010) (finding that no contract existed that required the defendant to negotiate a loan modification with the defaulting plaintiff). Further, the plaintiff claims that none of the defendants were the “holder in due course.” This claim fails because “defendants do not need to produce the note to the property in order to proceed with a non-judicial foreclosure.” *Urbina v. Homeview Lending, Inc.*, 681 F. Supp. 2d 1254, 1258 (D. Nev. 2009).

Plaintiff’s claim that the substitution of trustee was not valid stems from a MERS’ employee’s failure to write in a date when he granted authority to execute the substitution of trustee. (Compl. ¶166). Plaintiff alleges that the absence of a date results in a legitimate question as to the employee’s authority. *Id.* However, this is plaintiff’s lone factual allegation that the aforementioned employee lacked authority, and all complaints must set forth enough facts to state a claim that is plausible on its face. *Bell Atlantic Corp.*, 550 U.S. at 544. Thus, plaintiff fails to allege a legitimate claim that “state[s] a claim for relief that is plausible on its face”. *Id.* at 570.

F. Claim 6 - Good Faith Claim

Plaintiff lacks standing to bring her good faith claim against BAC defendants’ for failure to modify the loan since she has no loan with the defendants. Moreover, plaintiff has failed to cite to any rule of law, whether it be case law or statute, that places a duty upon a lender to modify a loan with a borrower, let alone a party not named on the loan.

G. Claim 7 - Breach of Fiduciary Duty

Plaintiff alleges that the defendants “placed themselves in a position of trust by virtue of the expertise represented by and through their employees and/or agents.” (Compl. ¶188). It seems that the scope of this claim revolves around the unwillingness of the BAC defendants to modify the loan. Specifically, the plaintiff alleges present and future economic loss as a result of the defendants’ “refusal to accept and to negotiate in good faith.” (Compl. ¶190).

However, even disregarding the fact that the plaintiff lacks standing, as she is not the original borrower, the plaintiff’s claim fails. Specifically, the Ninth Circuit has recognized that *no* duty exists

1 between lenders and debtors, and held that they are “adversaries, not fiduciaries.” *Giles v. Gen*
 2 *Motors Acceptance Corp.*, 494 F.3d 865, 882 (9th Cir. 2007). Further, “a financial institution does
 3 not owe a duty of care to a borrower when the lender’s involvement in the loan transaction does not
 4 exceed the scope of its conventional role as lender of money.” *Velasquez v. HSBC Mortg. Serv.*,
 5 2009 WL 2338852, *5. (D. Nev. July 24, 2009). Additionally, “the lender is under no duty to ensure
 6 the success of the borrower’s investment.” *Id.* Finally, “courts have repeatedly held that a lender
 7 owes no fiduciary duties to a borrower absent exceptional circumstances, such as when a special
 8 relationship exists between the two parties.” *Larson v. Homecomings Fin., LLC*, 680 F. Supp. 2d
 9 1230, 1234 (D. Nev. 2009); *see Yerington Ford, Inc. V. General Motors Acceptance Corp.*, 359 F.
 10 Supp.2d 1075, 1090 (D. Nev. 2004). Here, the plaintiff has failed to allege any special relationship,
 11 and the claim must fail.

12 H. Claim 8 - Fraudulent Inducement and Deceit

13 A claim for fraud must be pled with particularity under Federal Rule of Civil Procedure 9(b).
 14 *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999). To meet this standard, plaintiff must
 15 present details regarding the “time, place, and manner of each act of fraud, plus the role of each
 16 defendant in each scheme.” *Lancaster Com. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405
 17 (9th Cir. 1991).

18 The plaintiff fails to plead fraud with particularity. As a result, plaintiff’s conglomerated
 19 claims are conclusory. For example, the plaintiff alleges that the employee who signed the notice of
 20 default on behalf of ReconTrust lacked authority to execute the document (compl. ¶192) because he
 21 did not identify his “title” and “authority” on the notice. (*Id.*) Additionally, plaintiff alleges that
 22 “defendant and each of them were aware of the false representations of Recontrust. . . defendant
 23 BAC. . . defendant New York . . . [and that] each defendant remained silent thereby aiding the false
 24 statements of one another.” (Compl. ¶197). Plaintiff based these allegations on the bare assumption
 25 that the notice of default was falsely represented. (Compl. ¶195). Plaintiff does not give any facts
 26 as to how the notice was falsely represented, seemingly relying on her previous incorrect
 27 determination that the employee who signed the notice lacked authority. This is insufficient to state
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1 a claim of fraud as required under Rule 9(b).

2 I. Claim 9 - Slander of Title

3 Slander of title involves (1) false and malicious communications; (2) disparaging to one's
4 title in land; (3) causing special damage. *Higgins v. Higgins*, 744 P.2d 530 (Nev. 1987) (citing
5 *Rowlands v. Lepire*, 662 P.2d 1332 (Nev. 1983) and *Summa Corp. v. Greenspun*, 655 P.2d 513, 514
6 (Nev. 1982)). Nevada Revised Statute §107.80(2)(c) gives the trustee the power of sale once the
7 notice of default has been recorded. Plaintiff's claim fails because ReconTrust recorded a valid note
8 of default against the property on June 1, 2010 (doc. # 10 - exhibit K), and the recording of the
9 default involved neither false nor malicious communications. Thus, plaintiff fails to state a claim for
10 slander of title.

11 J. Claim 10 - Willful Violation of 11 U.S.C. 362

12 Plaintiff's claim is not cognizable against the BAC defendants. Instead, plaintiff's claim is
13 against Bank of New York Mellon. (Compl. ¶211). Therefore, plaintiff's claim fails.

14 K. Claim 11 - Racketeer Influenced and Corrupt Organizations ("RICO")

15 In order to satisfy the elements of a civil R.I.C.O. claim, plaintiff must allege "(1) conduct
16 (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury to [plaintiffs']
17 'business or property.'" *Ove v. Gwinn*, 264 F.3d 817, 825 (9th Cir. 2001) (citing 18 USC 1964(c)).
18 Racketeering is defined as "engaging in at least two crimes related to racketeering that have the same
19 or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise
20 interrelated by distinguishing characteristics and are not isolated instances" NRS 207.390. The
21 Ninth Circuit has "applied the particularity requirements of rule 9(b) to RICO claims. *Moore v.*
22 *Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir. 1989).

23 The plaintiff fails to show with any specificity that the defendants engaged in racketeering
24 or caused her injury as a result of any alleged wrongdoing. Throughout her RICO claim (compl.
25 ¶221-34), plaintiff states conclusory allegations that lack the particularity required by rule 9(b).
26 Plaintiff uses terms like "misconduct," "racketeering activity," and "predatory lending," but fails to
27 provide the factual foundation needed to satisfy a RICO claim. Thus, plaintiffs RICO claim is
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1 dismissed for failure to state a claim.

2 L. Claim 12 - Specific Performance

3 Plaintiff seeks specific performance of a contract she alleges to have entered into with
4 defendants Somy and Saisuda, who are not parties to this motion. (Compl. ¶245). Accordingly,
5 because none of the BAC defendants are parties to this contract, this claim is not directed towards
6 them and thus must fail.

7 M. Claim 13 - Quiet Title

8 Quiet title has no place in this complaint. “[A] trustor cannot quiet title without discharging
9 his debt. The cloud upon his title persists until the debt is paid.” *Aguilar v. Bocci*, 39 Cal. App. 3d
10 475, 478 (1974). The fact that ReconTrust recorded a valid note of default against the property on
11 June 1, 2010 (doc. # 10 - exhibit K) shows that the debt on the property is anything but paid.
12 Therefore, this claim fails.

13 N. Claim 14 - Unfair Debt Collection Practices

14 Plaintiff alleges that the defendants violated the Fair Debt Collection Practices Act
15 (“FDCPA”), RESPA and the “Nevada Debt Collection Practices Civil Codes,” which the defense
16 has interpreted as the Nevada version of the Fair Debt Collections Practices Act (“Nevada’s
17 FDCPA”), NRS §649. (Compl. ¶252).

18 The RESPA claim is repetitive of claim three and again fails to state a claim, because
19 Nevada’s FDCPA does not provide a private cause of action. *See* N.R.S. § 649.395 (the
20 Commissioner of Financial Institutions is vested with the power to lay fines and seek injunctive
21 relief for violations of Chapter 649 on behalf of the state of Nevada). Finally, plaintiff’s federal
22 FDCPA claim fails because, as she is not on the note and the BAC defendants are not collecting a
23 debt against her, she lacks standing to pursue this claim.

24 O. Claim 15 - Predatory Lending Practices

25 Plaintiff is likely making a claim under the Nevada Unfair Lending Practices Act. *Villa v.*
26 *First Guar. Fin. Corp.*, 2010 WL 2953954, at *4 (D. Nev. July 23, 2010) (“The appropriate cause
27 of action to plead for alleged predatory lending is section 598D.100”). Plaintiff lacks standing to
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1 under §598D since she did not borrow any money and thus was not the target of predatory lending.
2 (Compl. ¶256). The claim is dismissed.

3 P. Claims 16 and 18 - Imposition of Constructive Trust

4 Plaintiff alleges that the BAC defendants have failed to acknowledge her “status as a rightful
5 joint tenant owner of the property” (compl. ¶259), and have “purported to obtain legal title to the
6 property by means of an unjustified and fraudulent non-judicial foreclosure sale,” (compl. ¶267).

7 The BAC defendants can properly foreclose under the deed of trust despite plaintiff’s joint
8 tenancy status. *DaSilva v. Wells Fargo Bank*, 2010 WL 4258528, at *1 (D. Nev. Oct. 20, 2010)
9 (holding that foreclosure is allowed against joint tenants). Additionally, plaintiff fails to specify any
10 fraud associated with the foreclosure other than stating an assumption that foreclosure is not proper
11 when joint tenants are involved. (Compl. ¶267). This assumption is misguided, and plaintiff’s claim
12 for fraud has not been pled with particularity under Federal Rule of Civil Procedure 9(b).

13 Q. Claim 17 - Fraud

14 Plaintiff’s last claim merely recites the elements of fraud, but alleges nothing else. Plaintiff
15 claims that the defendants made false representations to her (compl. ¶263), but does not state what
16 these false representations were. Plaintiff alleges that the defendants are guilty of “malice, fraud, or
17 oppression”(compl. ¶265), but fails to give any reason as to how or why they are guilty of such
18 offenses.. Thus, plaintiff’s claim for fraud must fail since it has not been pled with particularity under
19 Federal Rule of Civil Procedure 9(b).

20 R. Conclusion

21 Federal Rule of Civil Procedure 41 allows a court to dismiss a complaint with prejudice if
22 the complaint fails to comply with the Federal Rules. However, a court should not dismiss with
23 prejudice under Rule 41 before considering less drastic alternatives. *McHenry v. Renne*, 84 F.3d
24 1172, 1178 (9th Cir. 1996).

25 In the instant case, the court finds dismissal without prejudice is warranted. If plaintiff
26 chooses to pursue the causes of action, she should revise the complaint to: (1) succinctly state the
27 facts, linking them to specific, cognizable legal theories, and (2) exclude quoted information that is
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unnecessary to prove the case. If plaintiff's amended complaint fails to meet the requirements of Rule 8, this court may then consider dismissal with prejudice under Rule 41. *McHenry*, 84 F.3d at 1130.

III. PLAINTIFF'S MOTION FOR DEFAULT JUDGEMENT AGAINST SAISUDA AND SOMY

Federal Rule of Civil Procedure 54(b) provides that when "multiple parties are involved, the court may direct entry of final judgment as to one or more, but fewer than all, claims or parties, only if the court expressly determines that there is no just reason for delay." In *In re First T.D. & Inv., Inc. v. Chang*, 253 F.3d 520, 532 (9th Cir. 2001), the Ninth Circuit adopted the principal in *Frow v. De La Vegas*, 82 U.S. 552 (1872), which held that "where a complaint alleges that defendants are jointly liable and one of them defaults, judgement should not be entered against the defaulting defendant until the matter has been adjudicated with regard to all defendants." Additionally, the Ninth Circuit has recognized the Eleventh Circuit's extension of the *Frow* principle "to apply to defendants who are similarly situated, even if not jointly and severally liable." *In re First T.D. & Inv., Inc. v. Chang*, 253 F.3d at 532.

Defendants Saisuda and Somy are similarly situated with the BAC defendants. The plaintiff's continuous lack of standing throughout her complaint and her inability to adequately plead fraud are just as associable to her claims against the BAC defendants as they are to Somy and Saisuda. The only claims that might be cognizable against Somy and Saisuda are claims four and twelve. However, the plaintiff still fails to set forth enough facts to state a claim that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 544. Thus, although these defendants have failed to respond to the complaint, plaintiff's motion for default judgement (doc. #27) must fail. A motion to dismiss her complaint against defendants Somy and Saisuda and their trusts must be entered without prejudice. The complaint is therefore also dismissed without prejudice as to all defendants.

1 Accordingly,

2 IT IS HEREBY ORDERED ADJUDGED AND DECREED that BAC defendant's motion
3 to dismiss (doc. # 9) is hereby GRANTED. The case is hereby dismissed without prejudice.

4 IT IS FURTHER ORDERED that plaintiff's motion for default judgment against defendants
5 Sariang Somy, Sariang Trust, Saisuda Saedan, and the Saedan Trust (doc. #27) be, and the same
6 hereby is, DENIED.

7 DATED February 3, 2011.

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9 
10 UNITED STATES DISTRICT JUDGE